

FILED

SEP 01 2016

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)

CLAIMANT: Northwestern Corporation

CASE 41I-640

OBJECTORS: Northwestern Corporation;
United States of America (Bureau of Reclamation)
State of Montana Attorney General

41I 94386-00
41I 94387-00
41I 94388-00
41I 94389-00
41I 94390-00

**ORDER DENYING MOTIONS TO AMEND,
ORDER JOINING ATTORNEY GENERAL, AND
ORDER SETTING SCHEDULING CONFERENCE**

I. INTRODUCTION

This case involves five water right claims owned by Northwestern Corporation (Northwestern) for Hauser Dam and Lake. All of the claims are for power generation. Four are for storage and one is for direct flow from the Missouri River. The original claimant was the Montana Power Company.

Northwestern and the United States Bureau of Reclamation objected to four of the claims. All five claims have issue remarks. The issue remarks for each claim are shown below:

41I 94386-00: Direct Flow for Operation of Turbines at Hauser Dam

THE USE OF THIS WATER APPEARS TO BE LARGELY NON-CONSUMPTIVE.

THE CLAIMED VOLUME EXCEEDS MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 441,005.00 ACRE-FEET PER YEAR.

41I 94387-00: Storage at Hauser Lake

THE USE OF THIS WATER APPEARS TO BE LARGELY NON-CONSUMPTIVE.
IT IS UNCLEAR WHETHER A FLOW RATE IS NEEDED TO ADEQUATELY
ADMINISTER THIS WATER RIGHT.

NO VOLUME HAS BEEN CLAIMED.

41I 94388-00: Storage at Hauser Lake

THE USE OF THIS WATER APPEARS TO BE LARGELY NON-CONSUMPTIVE.

NO VOLUME HAS BEEN CLAIMED.

IT IS UNCLEAR WHETHER A FLOW RATE IS NEEDED TO ADEQUATELY
ADMINISTER THIS WATER RIGHT.

41I 94389-00: Storage at Hauser Lake

THE PRIORITY DATE AND TYPE OF HISTORICAL RIGHT ARE QUESTIONABLE.
DOCUMENTATION IN THE FILE INCLUDES 4 FILED APPROPRIATIONS WHICH DO
NOT MATCH THE CLAIMED PRIORITY DATE. THESE FILING ARE AS FOLLOWS: -1
FILING FOR 7500 CFS DATED 4-29-1905 -1 FILING FOR 8120 CFS DATED 5-06-1905 -1
FILING FOR 8120 CFS DATED 6-23-1905 -1 FILING FOR 8120 CFS DATED 8-25-1906.

IT IS UNCLEAR WHETHER A FLOW RATE IS NEEDED TO ADEQUATELY
ADMINISTER THIS WATER RIGHT.

THE USE OF THIS WATER APPEARS TO BE LARGELY NON-CONSUMPTIVE.

NO VOLUME HAS BEEN CLAIMED.

41I 94390-00: Storage at Hauser Lake

THE USE OF THIS WATER APPEARS TO BE LARGELY NON-CONSUMPTIVE.

NO VOLUME HAS BEEN CLAIMED.

IT IS UNCLEAR WHETHER A FLOW RATE IS NEEDED TO ADEQUATELY
ADMINISTER THIS WATER RIGHT.

Northwestern has filed motions to amend two of its water rights and withdraw
three others. It asserts that its proposed amendments adequately address the issue
remarks attached to its claims and that those remarks should be removed.

II. STATEMENT OF THE ISSUES

1. Should Northwestern's motions to amend its water rights be granted?

2. Does the information supplied by Northwestern adequately address the issue remarks attached to its claims?

III. ANALYSIS

1. Should Northwestern's motions to amend its water rights be granted?

The Legislature determined "that it is in the state's best interest to ensure that valid issues raised as a result of claims examination...are resolved before a final decree is issued." § 85-2-247(1), MCA. Issue remarks can be resolved through the objection process or through direct involvement of the Water Court and the DNRC. § 85-2-248, MCA.

Northwestern has the burden of proving that its motions to amend should be granted.

The effect of a motion to amend a statement of claim is simply that it is judged against the original claim to determine if sufficient evidence supports the requested amendment. W. R. Adj. R. 19 states that the original filed claim is prima facie proof of the elements of the claim, and even a claimant's objection to her own claim must be proven by a preponderance of the evidence to overcome this prima facie proof.

Nelson v. Brooks, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558 (emphasis omitted).

In this case, the Water Court ordered Northwestern to confer with the DNRC and attempt to resolve the issue remarks. The Court also ordered the DNRC to file a report containing recommendations for resolution of the remarks on Northwestern's claims.

Northwestern filed motions to amend claims 41I 94386-00 and 41I 94387-00. It also filed conditional withdrawals of claims 41I 94388-00, 41I 94389-00, and 41I 94390-00. The withdrawals were conditioned on acceptance of the amendments proposed for claims 41I 94386-00 and 41I 94387-00.

Northwestern met with the DNRC, which filed a report containing recommendations for resolution of issue remarks on July 25, 2016. The recommendations of the DNRC were essentially the same as Northwestern's amendments.

Northwestern's amendments and the DNRC's recommendations for 41I 94386-00 and 41I 94387-00 were as follows:

41I 94386-00

This claim is a direct flow right for delivery of water through turbines at Hauser Dam. The issue remark for this right noted that the claimed volume exceeded the amount possible given the claimed flow rate and period of use.

Volume is determined by multiplying flow rate by the amount of time the claimed flow rate is diverted. The DNRC calculated the maximum volume possible for this right to be 3,441,005 acre feet per year (AFY).¹ This calculation appeared to be based on the assumption that Northwestern's turbines have historically run at their maximum flow rate twenty four hours per day, 365 days per year. DNRC recommended the volume be changed to 3,441,005 AFY.

Northwestern's amendment requested modification of its volume to 3,441,005 AFY. Northwestern did not supply evidence to support its amendment. There was no evidence that 3,441,005 AFY had historically been run through the turbines at Hauser Dam, and no evidence that the capacity of the turbines has remained the same from the inception of the right. In the absence of such evidence, Northwestern has not met the standard applicable to claimants seeking to modify their claims.

41I 94387-00

This claim is for storage of water in Hauser Lake. The amendment proposed by Northwestern asserts that water stored in Hauser Lake is used for power generation not only at Hauser Dam, but also at other downstream facilities including Holter, Black Eagle, Rainbow, Cochrane, Ryan and Morony. Northwestern requested that these facilities be added to the place of use for claim 41I 94387-00. It also requested a volume of 204,133 AFY based on impoundment of that amount of water in Hauser Lake in 1962. The priority date Montana Power Company claimed for this right is June 23, 1905.

¹ The issue remark for claim 41I 94386-00 states the maximum feasible volume is 441,005 AFY. However, the DNRC's July 25, 2016 Memorandum indicates the issue remark states the maximum feasible volume is 3,441,005 AFY. Northwestern Corporation's Verified Motion to Amend 41I 94386-00 uses the same figure as the DNRC Memorandum. Based on the flow rate and period of use, the Court assumes the figure in the issue remark should be 3,441,005 AFY.

Northwestern's amendment does not indicate whether its hydropower facilities at Holter, Black Eagle, Rainbow, Cochrane, Ryan and Morony were constructed before or after Hauser Dam was built and Hauser Lake was created. Northwestern's amendment does not state when water from Hauser Lake was first used to generate hydropower at these facilities.² It is also unclear whether these facilities were initially owned by Montana Power Company or by other entities later acquired by Montana Power Company. These questions raise issues about when storage water in Hauser Lake was first used in these facilities.

The DNRC recommended eliminating the 3,380 CFS flow rate for this claim. It also recommended accepting the proposed volume of 204,133 AFY, and adding downstream power generation facilities to the place of use for this right. The DNRC's recommendations were not supported by evidence of actual historical use.

The motion to amend claim 41I 94387-00 for storage water in Hauser Lake also lacks historical support. Although Northwestern supplied evidence that 204,133 acre feet was stored in Hauser Lake, this amount was not impounded until 1962, and there was no evidence that this amount of water, once impounded, was later used beneficially.

The 57 year gap in time between the priority date for this right and impoundment of the volume requested by the claimant raises questions about perfection of this water right. These concerns are amplified by the evidence of impoundments between 1931 and 1962 showing that the amount of water stored during that time was less than the amount now claimed.

Northwestern also asks that the flow rate initially claimed for this right be eliminated, and that no flow rate be decreed. This effectively allows the claimant to divert water irrespective of actual historical use. Moreover, removal of a flow rate for

² The Special Master's Report in *Montana Power Company v. Broadwater-Missouri Water Users' Association*, 50 F. Supp. 4 (1942) is referenced on the abstract for claim 41I 94387-00. A copy of the Special Master's Report was attached as an exhibit to claim 41I 94386-00. That Report indicates the Holter hydroelectric development was put into operation on April 30, 1918. This was thirteen years *after* the priority date for claim 41I 94387-00, which was for storage of water in Hauser Lake. Similar discrepancies exist for facilities at Black Eagle, Rainbow, Ryan, and Morony, all of which were placed into operation after storage of water began at Hauser. Based on the Master's Report, none of these facilities could have used Hauser Lake storage water in 1905, because they did not exist on that date.

Northwestern's right raises concerns about administration of its right in conjunction with other water rights on the Missouri River.

Finally, Northwestern seeks to amend the place of use for claim 41I 94387-00 by adding downstream power generation facilities. Its motion is not supported by evidence showing when those power generation facilities were built, or when water was released from Hauser Dam to supply those facilities.

In summary, Northwestern has not met the standard required to amend either of its claims.

2. Does the information supplied by Northwestern adequately address the issue remarks attached to its claims?

As with Northwestern's motions to amend, there is little evidence available to enable resolution of issue remarks attached to its claims. Both the DNRC and Northwestern have recommended establishing a volume for claim 41I 94386-00 that is based on the maximum possible annual diversion rather than historical beneficial use. A bedrock principle of Montana water law is that the extent of a claim depends on actual beneficial use. Northwestern's response to the volume issue remark does not contain any information indicating what amount of water its predecessors actually used and when such use occurred. Without this information, it is not possible to determine the extent of the water right perfected by Montana Power Company.

The issue remarks pertaining to volume give rise to issues regarding perfection of claim 41I 94387-00. Diversion records supplied by Northwestern to address the volume issue remark show that the volume it is requesting was not actually diverted until more than fifty years after the claimed priority date. The gap between priority date and actual beneficial use raises questions about whether the claimant was diligent about perfection of its water right. There is also no evidence that the 204,133 acre feet allegedly impounded by Montana Power Company in 1962 was used for power generation after it was captured in Hauser Lake.

The claimant has requested that downstream power generation facilities be added to the place of use for this right so that storage water from Hauser Lake can be used in

these facilities. Again, however, there was no information supplied to support these requested changes, and therefore no basis for concluding that a water right for storage in Hauser Lake was perfected for use at downstream facilities.

Montana statutes describe the process used to address unresolved issue remarks involving nonperfection or abandonment of a water right. Section 85-2-248(7)(a), MCA provides: "If an unresolved issue remark involves nonperfection or abandonment, the water court shall join the state of Montana through the attorney general as a necessary party to resolve the issue remark. The water court shall notify the attorney general of the joinder."

In accordance with Section 85-2-248(7)(a), MCA, the Water Court is joining the Montana Attorney General as a party to this case. The purpose of this joinder is to assist the Court with resolution of the issue remarks attached to these claims.

IV. CONCLUSION

1. Northwestern's motions to amend its water rights are not supported by sufficient evidence and should therefore be denied.
2. The information supplied by Northwestern does not adequately address the issue remarks attached to its claims, and does not allow those remarks to be resolved.

V. ORDER

Northwestern's motions to amend claims 41I 94386-00 and 41I 94387-00 are denied.

The issue remarks on all five of the above captioned claims are not resolved and will remain in place.

The Montana Attorney General is joined as a party to this case.

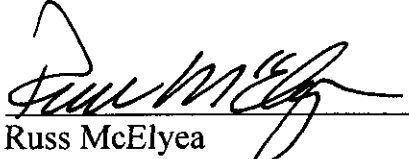
ORDERED that a scheduling conference will be held by telephone on **October 5, 2016 at 10:00 AM**. The instructions for accessing the call are as follows:

1. At the designated conference time dial the toll free telephone number:
1-877-526-1243
2. At the prompt, enter the participant pin code followed by the pound (#) key:
7685196#.

3. At the prompt state your name followed by the pound (#) key.

If you have any questions or if you experience problems placing this call you may contact the Water Court at 1-800-624-3270 (in state) or (406) 586-4364.

DATED this 1st day of September, 2016.


Russ McElyea
Chief Water Judge

Holly Franz
Franz & Driscoll, PLLP
PO Box 1155
Helena MT 59624-1155
(406) 442-0005
holly@franzdriscoll.com

James J. DuBois, Attorney
US Department of Justice
999 18th Street, South Terrace Suite 370
Denver, CO 80202
(303) 844-1375
james.dubois@usdoj.gov

Helena DNRC Adjudication Office
910 Helena Avenue
PO Box 201602
Helena, MT 59620-1602
Phone: (406) 444-0560
Fax: (406) 444-0569

Jeremiah D. Weiner, Esq.
Melissa Schlichting
Assistant Attorney General
State of Montana
215 North Sanders
PO Box 201401
Helena, MT 59620-1401
(406) 444-2026
jweiner2@mt.gov
mschlichting@mt.gov

Note: Caption and Service List Updated 8/25/2016

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